**U.S. Department of Labor**

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**Issue Date: 25 January 2005**

CASE NO.: 2004-LHC-1383
OWCP NO.: 10-39996

In the Matter of:

NELS JENSEN,
Claimant,

v.

MARINETTE MARINE CORP.,
Employer,

and

SIGNAL MUTUAL INDEMNITY ASSN., LTD.,
Carrier.

Appearances: Michael B. Kulkoski, Esq.
For the Claimant

Gregory P. Sujack, Esq.
For the Employer

Before: Stephen L. Purcell
Administrative Law Judge

## DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq*. Claimant is seeking future disability compensation and medical benefits with respect to an alleged work-related injury to his left shoulder on September 25, 2002.

A formal hearing was held in this case on September 1, 2004 in Green Bay, Wisconsin at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulation. Claimant offered exhibits 1 through 5 which were admitted into evidence.[1] Employer offered exhibits 1 through 14 which were also admitted into

[1] The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, and "Tr." for Transcript.

evidence. ALJX 1 through 4 were marked for identification and admitted into evidence without objection. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

## I. STIPULATIONS

The parties have stipulated (Tr. 5, ALJX 4) and I find that:

1. The parties are subject to the Act.
2. Claimant and Employer were in an employee-employer relationship at all relevant times.
3. A timely notice of injury was given by Claimant to Employer with respect to his alleged September 25, 2002 injury.
4. No disability has yet resulted from the September 25, 2002 injury alleged by Claimant.
5. Claimant filed a timely claim for compensation.
6. Employer filed a timely first report of injury and notice of controversion.
7. There has been no voluntary payment of compensation by Employer.
8. Claimant has not yet reached maximum medical improvement ("MMI").

## II. ISSUES

The following unresolved issues were presented by the parties:

1. Causation of Claimant's left shoulder injury.
2. The nature and extent of Claimant's disability.
3. Employer's liability for medical expenses.

## III. STATEMENT OF THE CASE

### Testimonial and Non-Medical Evidence

Claimant testified that he was born on May 29, 1952, is presently 52 years old, attended school through part of the ninth grade, and is certified as a welder. Tr. 11. He is currently employed by Marinette Marine Corporation as a "welder leadman." *Ibid*. He began working for Employer in September or October 1977 and has worked for it since then. Tr. 12.

Claimant previously sustained a work-related injury to his left hand and suffered from reflex sympathetic dystrophy of the left arm which was no longer symptomatic at the time of the current injury. Tr. 12-13. He was not receiving treatment for his left upper extremity after the year 2000. Tr. 14. He had problems with his right shoulder and underwent surgery on the right shoulder. Tr. 14.

According to Claimant, after he returned to work following his right shoulder surgery, he began to use his left arm more and started having problems with his left shoulder. Tr. 14-15. He

could not use his right arm at that time and was using his left arm to climb onto steel modules, and to lift welding machines and equipment. Tr. 15.

On September 25, 2002, according to Claimant:

> I had been working throughout the areas of the shop doing a lot of climbing, and the area I was actually working in when I wasn't working with the workers. I was climbing in and out of one of the sections. I was working on fitting heavy steel plates, and using pieces of steel to – with a large sledgehammer, and I came down off the ladder to adjust it and I felt severe pain shoot down my arm and up into my head and neck.

Tr. 16. Claimant was working by himself, and there were no witnesses to the incident. *Ibid*. He had never previously experienced pain like that in his left upper extremity. Tr. 16-17. He reported the injury immediately to his foreman, Rick Summers. Tr. 17. *See also* CX 5. Claimant declined to go to the hospital and said he would go home and "put some heat on it, and if I didn't feel any better in the morning I would go and see a doctor." Tr. 17-18.

Claimant does not attribute the onset of pain in his left shoulder to any type of trauma or a traumatic accident on September 25, 2002. Tr. 18. He testified:

> All I know is that there was a small compact section of the stern section that I was crawling throughout that night trying to fit [sic] this to weld it, and I had been working on a ladder, and I was doing a stressful reaching position that I was in using dog and wedges to – up some heavy plates using a large steel sledgehammer throughout the night. And I came down off that ladder to adjust that ladder to a different position when I had that severe pain all through my arm and up into my head area.

Tr. 18. The sledge hammer he was using required the use of both hands, and the ladder he moved was an eight foot fiberglass step ladder which weighed about 45 pounds. Tr. 18-19. He had grasped the ladder by the wrung and pulled it to adjust its position when he felt a sharp pain. Tr. 19. Claimant reported his injury to Rick Summers about ten minutes after the incident, but he finished working the remainder of his shift. Tr. 19.

Claimant sought medical attention the following day. *Ibid*. He saw Dr. Leow, an orthopedic specialist, who had treated Claimant previously when he underwent surgery on his right shoulder. Tr. 20. Dr. Leow ordered an MRI and subsequently recommended surgery on Claimant's left shoulder. *Ibid*. Claimant did not undergo the surgery, however, because Employer's carrier declined coverage. Tr. 20-21.

Dr. Leow placed Claimant on work restrictions of lifting no more than five pounds and no overhead work using the left arm, but Claimant told him that he could not do his job with those types of restrictions. Tr. 22. Claimant continued to perform his job after September 25, 2002, which involved a lot of climbing ladders and crawling in narrow spaces, without regard to

the restrictions imposed by Dr. Leow. Tr. 22-23. He has "a lot of severe pain pretty much throughout the day, and . . . [doesn't] have the strength in that area that [he] did before." Tr. 23.

Claimant underwent an examination by Dr. Kihm which was arranged by the Department of Labor. Tr. 24. His condition in December 2002, at the time of Dr. Kihm's examination, was about the same as it was on September 25, 2002. Tr. 25. He also saw a neurologist and underwent neurological testing on his left upper extremity. *Ibid*.

Claimant plans to continue working until he is no longer physically able to do so. Tr. 26. He has no other source of income and his regular medical insurance does not cover workers' compensation injuries. *Ibid*.

Claimant did not recall any injuries to his left shoulder other than the September 2002 incident. Tr. 27. He believes he may have reported some discomfort in the left shoulder to Dr. Leow in September 2001 when he was seen for follow-up with regard to his right shoulder surgery. *Ibid*. Claimant was then complaining of pain with overhead activities, and Dr. Leow injected his shoulder with a painkiller and some steroids. Tr. 28. The only problems Claimant is now having is with his left shoulder pain and carpal tunnel syndrome. *Ibid*.

Medical Evidence

**Dr. Thomas E. Leow, Jr.**

Dr. Leow reported left trochanteric bursitis, neck pain, and right shoulder impingement on February 27 and April 24, 2001 when Claimant was seen for complaints of right shoulder and left hip pain. EX 4 at 16-17.

A bone scan performed on June 29, 2001 revealed "some uptake in the area of the right humerus, which the radiologist speculates may be secondary to a rotator cuff injury." EX 5 at 10-11; EX 7 at 1.

A July 19, 2001 MRI of the right shoulder revealed early acromial clavicular degenerative changes and findings consistent with a tear of the supraspinatus muscle where it attached to the superior lateral humerus. EX 4 at 21; EX 8.

On July 26, 2001, Dr. Leow diagnosed a right shoulder supraspinatus muscle tear. EX 4 at 12.

Claimant underwent a right shoulder arthroscopy with debridement of a rotator cuff tear and subacromial decompression on August 9, 2001. EX 4 at 18-19.

A treatment note dated September 20, 2001 reflects that Claimant's right shoulder was "doing great" but Claimant was complaining of similar symptoms in his left shoulder with pain associated with overhead activities. EX 4 at 10.

Claimant was examined by Dr. Leow on November 13, 2001 for left shoulder pain which was getting worse following surgery on his right shoulder and originating in his neck. EX 4 at 9.

A treatment note by Dr. Leow, dated September 26, 2002, notes that Claimant was examined for left shoulder pain "in his muscle posteriorly." CX 2 at 2; EX 4 at 8. Physical examination revealed paraspinal muscle spasms, pain and shooting sensations down the arm, questionable nerve root impingement signs, and good strength. Dr. Leow ordered an EMG and MRI. Claimant was given restrictions of lifting no more than 2 pounds, minimum work using the left arm, and no over the shoulder work. EX 5 at 21.

On September 28, 2002, Claimant had an MRI of the left shoulder which revealed a "[p]robable small full thickness tear of the anterior aspect of the infraspinatus tendon with supraspinatus tendinopathy." EX 4 at 20.

An October 9, 2002 EMG by Dr. David K. Kaufman, on referral by Dr. Leow, revealed moderate left carpal tunnel syndrome without evidence of denervation, ulnar neruopathy, brachial plexopathy, or cervical radiculopathy on the left. EX 4 at 23; EX 5 at 23; EX 10.

On October 15, 2002, Dr. Leow saw Claimant. CX 2 at 3; EX 5 at 25. He noted that Claimant continued to have left shoulder pain with range of motion and "stinging in his 4th finger with shoulder extension. Physical examination revealed

> positive Hawkin's, Neer's and "impingement signs. There is negative drop arm test today. CMS is intact. His [sic] does have a mild shoulder shrug. He has some infrasupinatus muscle tenderness as well as supraspinatus muscle tenderness on exam. His strength is otherwise good.

*Ibid*. The EMG revealed left carpal tunnel syndrome, which Dr. Leow noted was the likely cause of the numbness Claimant was experiencing. *See* CX 4. The MRI revealed "a small full thickness tear in his shoulder with tendonopathy." *See also* CX 3 at 2. A wrist splint was prescribed for the carpal tunnel syndrome, and Dr. Leow recommended surgery for the left shoulder rotator cuff tear. Under "Past Surgical History," Dr. Leow noted that Claimant had undergone left hand/wrist surgery and left shoulder arthroscopy in the past.[2] CX 2 at 4.

A June 17, 2003 treatment note by Dr. Leow reflects that Claimant did not report any improvement in his left shoulder since his injections. CX 2 at 5. Examination again revealed positive Hawkin's, Neer's, and Impingement signs, mild decreased strength, and good range of motion. Some subacromial crepitus was noted, and there was a positive Phalen's sign on examination of the left wrist. Dr. Leow continued to recommend surgery to repair the rotator cuff "especially now that he has also failed conservative treatment." He also recommended surgery for the carpal tunnel syndrome based on Claimant's positive EMG results.

On July 15, 2003, Dr. Leow reported that Claimant's left shoulder was still positive on examination for Hawkin's, Neer's, and Impingement signs. CX 2 at 6. He also noted distal

[2] A subsequent treatment note reflects that the arthroscopy was on the *right* shoulder. CX 1 at 6.

lateral rotator cuff tenderness, a positive shoulder shrug test, and positive Tinel's and Phalen's signs. Dr. Leow recommended proceeding with surgery. EX 4 at 3.

On July 15, 2003, Dr. Leow continued to recommend surgery for left rotator cuff tear and carpal tunnel syndrome. EX 4 at 5. He noted that an EMG of the left wrist was positive.

**Belin Hospital**

Claimant was seen by Dr. Saied J. Assef on July 31, 1997 for evaluation of neck, shoulder, arm, back, and lower extremity pain. EX 1 at 5-6. Dr. Assef's report of examination notes: "This patient has an extensive past medical history with onset of symptoms back in 1982 when he sustained an injury while lifting an object of 200 to 400-pound weight at work (Marinette Marine). . . . The list of physicians who have seen this patient is quite long, exceeding perhaps thirty." He had been diagnosed with myofascial pain syndrome and "RSD [reflex sympathetic dystrophy] of the left upper extremity had been entertained at one point." When asked to describe his most severe complaints, Claimant stated

> he has low back pain radiating to his left hip to behind his left knee. He has pain between his shoulder blades that radiate[s] around the right scapula and he has right neck pain which radiates to the right side of the head all the way to the frontal region of the head. He also complains of left wrist pain on the radial side.

EX 1 at 5. Dr. Assef noted that Claimant had failed all prior modalities of intervention including trigger-point injections, epidural injections, physical therapy, and occupational rehabilitation. *Id*. at 6. He had nothing further to offer Claimant.

A subsequent examination by Dr. John E. Carey resulted in similar findings. EX 1 at 9. Dr. Carey wrote:

> Long-term goals are to manage his symptoms rather than eliminate them, as he has had these for nearly 20 years. Since this has not been successful on an out-patient basis by individual visits to multiple specialists, his best bet in long-term treatment success in managing his pain symptoms might be to participate in a comprehensive out-patient pain management program following the structure which is similar to that at the Mayo Clinic in Rochester, Minnesota.

*Ibid*.

**Dr. Karen B. Himmel**

Dr. Karen B. Himmel saw claimant on September 14, 1999 and diagnosed, *inter alia*, chronic pain with myofascial pain syndrome and RSD. EX 2 at 1.

On June 8, 2000, Claimant asked Dr. Himmel to remove his work restrictions so he could return to work. EX 2 at 3. Dr. Himmel noted that Claimant appeared to have his myofascial pain syndrome "under good control."

On January 18, 2001, Claimant saw Dr. Himmel for, *inter alia*, complaints of "some shoulder, hip and leg pain." EX 2 at 4. Physical examination was normal and the assessment was "pain in multiple sites."

A treatment note dated June 15, 2001 reflects that Claimant had been diagnosed "with left carpal tunnel syndrome on his left hand." EX 2 at 12. The same note also reflects that Claimant's past medical history was "[p]ositive for reflex sympathetic dystrophy of his left upper extremity . . ." Physical examination of the left upper extremity was normal with no signs of atrophy. *Id*. at 13.

A bone scan performed June 30, 2001, revealed, *inter alia*, "mild degenerative activity bilaterally within the acromioclavicular joints." EX 2 at 16. The scan further revealed slight increased activity near the margin of the right humeral head which could be related to tendonitis possibly involving the rotator cuff. *Ibid*.

Dr. Himmel subsequently wrote on July 13, 2001 with respect to the bone scan that "it looks as though there may be a [right] rotator cuff injury. . . ." EX 2 at 18. She also noted that Claimant was following up with Drs. Harrison and Leow, and that he would "most likely need to have an MRI done." *Ibid*.

In February and March 2002, Claimant continued to report right shoulder pain, as well as back pain. EX 2 at 22-23.

A July 2, 2002 treatment noted reflects that Claimant "has a history of reflex sympathetic dystrophy of his left shoulder and arm, myofascial pain syndrome. . . ." EX 2 at 21. The note also states: He said that last night he did a little more welding – he has had a supervisory job – and, with that, he started having more pain in his left shoulder." Physical examination of the extremities was normal and the assessment was, *inter alia*, "[p]ain in shoulder, left hip and knee as well as right shoulder pain." EX 2 at 25-26. Claimant's medications were changed and arrangements were made for "for physical therapy for ice therapy and aquatic therapy as well as massage, ultrasound, electrical stim[ulation], and exercises for his left shoulder RSD, left hip trochanteric bursitis, and right shoulder previous rotator cuff injury." *Id*. at 26.

An October 6, 2002 treatment note reflects that physical therapy was "helping to keep his [right] shoulder under good control; however, he's not doing much for the back." EX 2 at 27.

On October 16, 2002, Claimant was seen by Lynda J. Bahde, RN, APNP. EX 2 at 29. She noted, *inter alia*, "he's been having problems with a torn rotator cuff and carpal tunnel syndrome – this is a Workmen's Comp-related issue and he had been seeing Dr. Thomas Leow, Jr. He was wondering if he could get a referral to see Dr. Kaufman; he was informed that this really should be addressed through Dr. Leow's office." *Ibid*.

A note dated November 6, 2002 by Nurse Bahde reflects that Claimant was "scheduled to have surgery on his shoulder next week; however, he was informed that, because he continues to

be sick [with acute bronchitis], it will be better to postpone the surgery for at least 2 weeks – the patient was agreeable to this." EX 2 at 30.

No mention of Claimant's shoulder condition was made on his visits with Nurse Bahde on November 6 and 20, and December 3, 2002. EX 2 at 30-32.

On December 11, 2002, Nurse Bahde noted that Claimant stated "he continues to have a lot of [left] shoulder pain." EX 2 at 34. He was prescribed Tylenol 3 to take as needed.

A January 14, 2003 note reflects that Claimant "continues to have a lot of problems with reflex sympathetic dystrophy. He is being reevaluated by the physicians from Workmen's Comp, but he was wondering if he could possibly get something for the pain." EX 2 at 35. Anaprox-DS was prescribed, as well as Vicodin for when the pain became severe.

On April 15, 2003, Nurse Bahde reported that Claimant was

> having a lot of problems with joint pain. He has a history of reflex sympathetic dystrophy; he stated he went to see the physicians at Workmen's Comp, but Workmen's Comp has closed his case. He continues to have a great deal of problems and would like to be referred back to Dr. Harrison – he was informed this would be fine. He stated that he's also been having a lot of pain and discomfort in his other shoulder as well as in the joints of his arms and legs.

EX 2 at 36. She referred Claimant to Dr. Harrison for further evaluation of his RSD. EX 5 at 27.

A follow-up note dated July 15, 2003 regarding Claimant's RSD reflects that he was complaining of "a great deal of pain from his arm." EX 2 at 37. A trial of Percocet for severe pain was prescribed.

On September 4, 2003, Nurse Bahde ordered that Percocet be discontinued and Claimant was prescribed Hydrocodone for his RSD-associated pain. EX 2 at 38. He was referred back to Dr. Harrison.

On October 14, 2003, Claimant was again seen by Nurse Bahde who wrote:

> He . . . states that both of his shoulders are hurting significantly. He had been seeing Dr. Harrison as well as Dr. Thomas Leow, Jr, for the reflex sympathetic dystrophy. He also has a torn rotator cuff in his left shoulder which will require surgery. He is currently not accepting the idea of any surgery as Workmen's Compensation is denying his claim and he is currently fighting it.

EX 2 at 39.

Dr. Himmel saw Claimant on October 28, 2003 and reported that he was "having quite a bit of problems with left shoulder pain." EX 2 at 40. She noted that he had a torn rotator cuff for

which he needed surgery, and that his injury was likely from repetitive motion associated with his welding activities at work.

Dr. Himmel noted on November 25, 2003 that Claimant had "reflex sympathetic dystrophy, has a rotator cuff tear, and has injured both shoulders since he has returned back to work. EX 2 at 42. She also noted that he should have surgery, but was "waiting because Workmen's Comp will not pay for the surgery and he's in the process of evaluating with that."

Dr. Himmel saw Claimant again on January 6, 2004 and noted that he had "a lot of bilateral shoulder pain and hip pain." EX 2 at 43. He described his pain level "on average on a good day an 8 out of 10; it will go up to a 10/10 on a bad day."

On February 20, 2004, Claimant reported to Nurse Bahde that he had spoken with Dr. Harrison who informed him he did not feel he needed to have surgery but thought he should see a pain specialist. EX 2 at 44. He had seen the pain specialist, undergone epidural steroid injections, and experienced no relief.

On February 26, 2004, Claimant told Dr. Himmel that his shoulder pain was not bothering him as much as it had been. EX 2 at 45. She described his problems with the shoulder as "mechanical." Under "Assessment & Plan" she wrote, with respect to his chronic pain:

> Due to multiple reasons/etiologies – he has RSD of the left shoulder and arm, he's had a left hip trochanteric bursitis, also has a right rotator cuff injury for which he needs surgery, and he also has what appears to be radicular pain down his left leg that is consistent with the L2-3 level.

*Ibid*.

Dr. Himmel wrote on March 11, 2004 that Claimant "has a rotator cuff tear on the left, had recent surgery on his left shoulder, and recent surgery on his right shoulder."[3] EX 2 at 47. She further noted that "he was using a sledgehammer last night at work and injured his shoulder. He was advised that he should not be doing that."

On April 15, 2004, Dr. Himmel continued to describe Claimant's pain as mechanical and wrote "he really does need to stop using his arm, but he does not want to stop working at this time. We discussed that this seems to be aggravating the situation and this is the reason why he's not healing." EX 2 at 49.

Claimant reported somewhat improved pain on April 22, 2004 and that he did not want to be off work. EX 2 at 50. However, treatment notes through June 17, 2004 continue to reflect complaints of ongoing shoulder pain. EX 2 at 51-56. On his last visit, Dr. Himmel wrote that

[3] Claimant testified at the formal hearing that he had not undergone surgery on his left shoulder because Employer's carrier, to this point, has refused to pay for it. Tr. 20-21. There are no surgical reports with respect to left shoulder surgery around March 2004, there are no treatment records around that time or thereafter which refer to such surgery, and neither Claimant nor Employer have alleged in their post-hearing briefs that Claimant has undergone such surgery. It thus appears that Dr. Himmel's reference to "left shoulder surgery" is in error.

she "would like to encourage him to get the surgery as some of this pain is just mechanical." EX 2 at 55.

**Marshfield Clinic**

Treatment records from the Marshfield Clinic cover the period 1983 through 1992. They reflect treatment for a large number of conditions including, *inter alia*: low back strain/sprain; neck sprain; sinusitis; allergic rhinitis; chronic reactive depression; hives; reflex sympathetic dystrophy of the left hand; status post left thumb fusion; left wrist and knee pain; left thumb trapeziectomy; musculoligamentous neck and lower back discomfort; myofascial neck and low back pain; chronic left wrist pain; status post left carpal metacarpal effusion with nonunion; and spinal subluxation at L4-L5.

**Dr. Richard L. Harrison**

Claimant was examined on May 4, 2001 by Dr. Harrison for neck pain, shoulder pain, right upper extremity pain, back pain, and left lower extremity pain.[4] EX 5 at 1-2. Dr. Harrison noted that Claimant appeared to have a congenital abnormality of the superior articular facet of the cervical spine at C1-C2, mild disk space narrowing, and mild foraminal stenosis on review of a cervical x-ray. He recommended Claimant undergo a myelogram for further study of the cervical and lumbar spine.

A myelogram performed on May 11, 2001 showed a normal lumbar spine and minor ventral impressions at C4-C5 and C6-C7 of the cervical spine with questionable spondylosis versus disk protrusion at those levels. EX 5 at 3. The report further noted that there may be lateral extradural impressions on the C6 nerve roots at the C5-C6 level.

Claimant also had a CT scan of the cervical and lumbar spines on May 11, 2001 which revealed an insignificant minor disk bulge centrally at C3-C4 and C6-C7. EX 5 at 4. The scan also revealed advanced degenerative facet arthropathy at C7-T1 on the right.

Dr. Harrison reviewed Claimant's myelogram and MRI results with him on June 7, 2001. EX 5 at 8. He determined that claimant should undergo an EMG.

On June 13, 2001, Claimant was seen by Dr. Robert T. Schmidt, Jr. on referral by Dr. Harrison for complaints of numbness and tingling in his hands, as well as pain in the right shoulder and left hip. EX 5 at 5; EX 6 at 1. Dr. Schmidt found evidence of mild right carpal tunnel syndrome with no evidence of cervical radiculopathy.

Dr. Harrison reviewed Claimant's EMG results with him on June 28, 2001. EX 5 at 9. He thereafter recommended a bone scan.

[4] Although Dr. Harrison neglected to further describe Claimant's shoulder pain, it is clear that he was then complaining of right shoulder pain based on the treatment records of Dr. Leow which note that Claimant was complaining of, and being examined for, right shoulder pain. *See* EX 4 at 14-18, 21-22 covering period February through August 2001 and noting, *inter alia*, pain in right shoulder radiating up into neck, right shoulder arthroscopy for rotator cuff tear right shoulder.

In April 2003, Dr. Himmel's office referred Claimant back to Dr. Harrison for further evaluation for RSD involving the left upper extremity. EX 5 at 27.

On May 6, 2003, Dr. Harrison saw Claimant for his complaints of neck pain, numbness in his hands, back pain, and pain radiating into his left lower extremity. EX 5 at 29. He recommended an MRI of the cervical and lumbar spines.

MRI scans of the cervical and lumbar spines were performed on May 15, 2003. EX 5 at 30-31; EX 11-12. The impressions noted were moderate disc bulge at L4-L5 and moderate foraminal narrowing at C4-C5 and C6-C7. The disc bulge was believed not to be causing Claimant's complaints, while the foraminal narrowing in the cervical spine was felt to be "possibly causing" his symptoms.

**Dr. John L. Kihm**

At the request of the Department of Labor, Dr. Kihm performed an independent medical evaluation of Claimant on December 19, 2002 with respect to his September 25, 2002 injury. EX 13. Based on a review of relevant medical records, Claimant's reported histories, and physical examination, Dr. Kihm opined that Claimant suffered from rotator cuff impingement syndrome of the left shoulder with probable incomplete tearing and some cervical spondylosis. EX 13 at 8. He stated that Claimant had a rotator cuff degenerative process from impingement, which was present before his September 2002 injury, but stated that "the injury described likely irritated the cuff." He believed that Claimant's shoulder symptoms resulted from the impingement rather than the tear, and that such symptoms were "a natural progression of his left shoulder degenerative process, except that he did have a material aggravation of his symptoms from this ladder-lifting incident." He recommended continued strengthening exercises and a sub-bursal injection, but further recommended decompression surgery by Dr. Leow if symptoms persisted. EX 13 at 8-9. He also wrote:

> I do not believe there is any hurry on the basis of a tendon tear [for the decompression surgery], however, and I believe that any tear of the same will be due more to attritional changes from the impingement, than from the ladder episode.
>
> Therefore, the examinee has an underlying problem with the left shoulder, which had an aggravation at the time of the ladder incident. If this can be rendered asymptomatic by nonoperative treatment over a reasonable period of time of three to six months, . . . then that may suffice. Otherwise, proceeding with the decompression would be appropriate.

EX 13 at 9. He recommended work restrictions of no overhead work with his hands. He also opined that Claimant "may have electrophysiological changes of carpal tunnel syndrome, but it is not carpal tunnel syndrome by physical testing." EX 13 at 8.

In a letter dated January 24, 2003, Dr. Kihm "clarified" his earlier opinions stating that Claimant's "September 25, 2002 work incident resulted in a temporary aggravation that did not accelerate Mr. Jensen's pre-existing shoulder condition beyond it's [sic} natural progression." EX 14. No explanation for this "clarification" was given.

## IV. DISCUSSION

Causation

Section 2(2) of the LHWCA defines "injury" as

> accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. § 902(2). An "injury" occurs when something unexpectedly goes wrong within the human frame. *Johnson v. Brady-Hamilton Stevedore Co*., 11 BRBS 427, 428 (1970); *Wheatley v. Adler*, 407 F.2d 307, 311 at n.6 (D.C. Cir. 1968). The aggravation of a pre-existing condition is recognized as an injury under Section 2(2). *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989); *Janusziewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989) (Decision and Order on Remand); *Johnson v. Ingalls Shipbuilding Div., Litton Sys.*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981). Indeed, the aggravation of an existing injury is itself recognized as a "new injury." *See, e.g.*, *Bath Iron works Corp. v. Director, U.S. Dept. of Labor*, (*Jones*),193 F.3d 27 (1st Cir. 1999) (Initial asbestos-related injury was aggravated by further exposure to pulmonary irritants and was subsequently found to be a "new" injury resulting in an increase in benefits payable by a new carrier and based upon the average weekly wage at the time of the new injury); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), *aff'g Kelaita v. Triple A Machine Shop*, 17 BRBS 10 (1984) (aggravation of claimant's shoulder problems caused by conditions existing at more recent job constituted "new injuries" absolving previous employer from liability under Act); *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625, 25 BRBS 71(CRT) (9th Cir. 1991), *aff'g* 22 BRBS 453 (1989) (aggravation of a pre-existing disability during subsequent employment constitutes a second injury; claimant's pre-existing disability to back was aggravated by six months of jack hammering).

Section 20(a) of the LHWCA provides "in the absence of substantial evidence to the contrary," it is presumed "[t]hat the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). The presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

In order to establish a *prima facie* case for compensation, a claimant "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Indus./Fed. Sheet Metal v. Director, OWCP*, 455 U.S. 608 (1982), *rev'g Riley v. U.S. Indus./Fed.*

*Sheet Metal*, 627 F.2d 455 (D.C. Cir. 1980). He need not affirmatively establish a connection between work and physical harm but rather has the burden of establishing only:

> (1) that he sustained physical harm or pain, and
>
> (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain.

*Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 330-31 (1981), *aff'd sub nom*. *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Miranda v. Excavation Constr.*, 13 BRBS 882 (1981); *Golden v. Eller & Co.*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980).

According to Employer's counsel, "Claimant may be entitled to the presumption under Section 20 of the Act." Post-Hearing Brief and Argument of Employer ("Emp. Br.") at 8. I agree.

Claimant credibly testified that he was working on September 25, 2002, that his activities included a lot of climbing, heavy lifting, and use of a sledgehammer, and that he experienced severe pain in his left shoulder shooting down into his arm and up into his neck when he went to move a 45-pound step ladder upon which he had been working. Tr. 16, 18. Although he previously had bilateral shoulder problems, the pain he experienced at that time was unlike any pain he had known before. Tr. 16-17. He sought medical treatment the next day from Dr. Leow, the orthopedic specialist who had been treating Claimant for a variety of conditions. Tr. 20.

I find that Claimant's credible and uncontradicted testimony is sufficient to establish a *prima facie* case of entitlement to benefits under the Act. He clearly experienced severe pain in his left shoulder and arm which could have been caused by the activities in which he was engaged on September 25, 2002 while working for Employer. He is thus entitled to the benefit of the Section 20(a) presumption.

Once the presumption arises that an employee's injury is work related, the employer must present substantial evidence sufficient to sever the causal connection between the injury and the employment. *See American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *American Grain Trimmers, Inc. v. Director, OWCP* [*Janich*], 181 F.3d 810, 33 BRBS 71 (CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000). Where aggravation of a pre-existing condition is at issue, an employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *See, e.g., Cairns v. Matson Terminals*, 21 BRBS 252 (1988). However, proof of another agency of causation is not necessary to rebut the presumption. *See Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982) (Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*,

467 U.S. 1243 (1984). A physician's unequivocal testimony regarding the lack of a causal nexus, rendered to a reasonable degree of medical certainty, is sufficient to sever the causal relationship between a claimant's employment and his harm. *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must then weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

To overcome the Section 20(a) presumption, Employer relies principally on the medical opinion of Dr. Kihm. Emp. Br. at 6-7. According to Employer:

> Dr. Kihm diagnosed the Claimant as having a rotator cuff degenerative process from impingement. Dr. Kihm further diagnosed . . . Claimant with a probable partial cuff tear. However, Dr. Kihm opined that the Claimant's symptomatology was coming not from the tear itself, but from the impingement. Dr. Kihm explained that impingement is an anatomic situation, which he opined predated the accident in question. Dr. Kihm further noted that the Claimant's symptoms were a natural progression of his left shoulder degenerative process. Dr. Kihm's opinions are unrebutted, and supported by the medical records.

Emp. Br. at 6.

In his January 24, 2003 letter "clarifying" his opinion regarding the cause of Claimant's left shoulder condition, Dr. Kihm did indeed unequivocally opine that Claimant's "September 25, 2002 work incident resulted in a temporary aggravation that did not accelerate Mr. Jensen's pre-existing shoulder condition beyond it's [sic] natural progression." EX 14. However, his original opinion was not quite so clear. He concluded at the time of his December 19, 2002 examination that Claimant had a rotator cuff degenerative process from impingement before his September 2002 injury, but stated that "the injury described *likely irritated the cuff*." EX 13 at 8 (italics added). He also stated at that time that Claimant's symptoms were "a natural progression of his left shoulder degenerative process, *except that he did have a material aggravation of his symptoms from this ladder-lifting incident.*" *Ibid*. (italics added). No explanation was given for his more definitive opinion in January 2003, and there is no evidence that he either re-examined Claimant at that time or that he reviewed any evidence that he had not previously seen.

As noted above, a physician's unequivocal testimony regarding the lack of a causal nexus is, with respect to the Section 20(a) presumption, sufficient to sever the causal relationship between a claimant's employment and his harm. *O'Kelley v. Dep't of the Army/NAF,* 34 BRBS at 39. While his original opinion left some room for doubt, Dr. Kihm's opinion as of January 24, 2003 was clear and unequivocal – Claimant's September 2002 injury did not accelerate his shoulder condition beyond its natural progression. Dr. Kihm's opinion is based on a physical examination of Claimant and a review of numerous treatment records dated from February 2001 to October 2002, *i.e*., both before and after Claimant's September 2002 injury. The opinion is relevant evidence which a reasonable mind might accept as adequate to support the conclusion that Claimant's left shoulder condition was not aggravated by his on-the-job injury, and I thus find that Employer has produced substantial evidence rebutting the Section 20(a) presumption.

*See American Grain Trimmers, Inc. v. Director, OWCP* [*Janich*], *supra*, 181 F.3d at 818. The entire evidence of record must therefore be considered.

In his post-hearing brief, Employer's counsel argues:

> Claimant had a longstanding history of complaints and problems related to his left shoulder. The evidence further reveals that the Claimant was actively treating for his left shoulder condition during the month prior to the accident in question. The only physician to render his opinion regarding whether the Claimant's current condition, and the need for surgery, is related to the accident in question was Dr. Kihm. Dr. Kihm opined that although the Claimant may require surgery, neither the cause, nor the need for surgery are related to the accident in question. As such, this Court should give Dr. Kihm's opinions great weight, and determine that the Claimant's current condition, and the need for surgery, are not related to the accident in question.

Emp. Br. at 9.

Although I have found Dr. Kihm's opinion adequate to rebut the Section 20(a) presumption, I find that the opinion is contradicted by other substantial medical evidence of record, most notably the opinions of Drs. Leow and Himmel, both of whom are Claimant's treating physicians. For the reasons set forth below, I accord greater weight to those opinions than I do to the contrary opinion of Dr. Kihm.

It is within the administrative law judge's authority to evaluate and draw inferences from the medical evidence of record. When an injured employee seeks benefits under the LHWCA, a treating physician's opinion is entitled to "special" weight. *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998); *see also*, *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54 (2nd Cir. 2001). Generally, the administrative law judge is entitled to give greater weight to the opinion of a treating physician than to that of a nontreating physician. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366 (6th Cir. 1998). However, the administrative law judge must apply substantial evidence, and "must examine the logic of [the parties'] conclusions and evaluate the evidence upon which their conclusions are based." *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 140 (4th Cir. 1998). To be sufficient, the evidence must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Claimant began seeing Dr. Leow in early 2001 for various orthopedic complaints including, *inter alia*, right shoulder and neck pain. EX 4 at 16-17. He underwent arthroscopic surgery on his right shoulder on August 9, 2001, and thereafter complained to Dr. Leow that he was experiencing pain in his left shoulder associated with overhead activities. EX 4 at 10, 18-19. Dr. Leow opined on November 13, 2001 that there was questionable nerve root impingement and noted Claimant had good strength in the extremity. EX 5 at 20. The day following his September 25, 2002 injury, Dr. Leow examined Claimant and noted paraspinal muscle spasms, pain and shooting sensations down the left arm, and possible nerve root impingement signs. He

ordered an EMG and MRI and imposed restrictions of lifting no more than 2 pounds, minimum work using the left arm, and no above the shoulder work. EX 5 at 21. On October 9, 2002, based on the results of the MRI, Dr. Leow diagnosed a "[p]robable small full thickness tear of the anterior aspect of the infraspinatus tendon with supraspinatus tendinopathy." EX 4 at 20. On October 15, 2002, Dr. Leow noted continued left shoulder pain and again diagnosed a small full thickness tear in the left shoulder rotator cuff with tendonapathy based on his review of Claimant's MRI. CX 2 at 3. He further noted that Claimant had a history of some tendonitis in his shoulder in the past, which had been alleviated by injections, but wrote: "I feel that this [tear in his left shoulder rotator cuff] is probably a *new* problem." *Ibid*. (italics added). On June 17, 2003, Dr. Leow noted "continued left rotator cuff tear that was initially acute." CX 2 at 5. He continued to recommend surgery since conservative treatment had failed, stating "I initially thought he should have had this done given his acute injury but now it is even becoming more chronic." *Ibid*.

Dr. Himmel saw Claimant on October 28, 2003 and reported that he was "having quite a bit of problems with left shoulder pain." EX 2 at 40. She noted that he had a torn rotator cuff *for which he needed surgery*, *and that his injury was likely from repetitive motion associated with his welding activities at work. Ibid*. (italics added). On April 15, 2004, she wrote that Claimant "really does need to stop using his [left] arm, but he does not want to stop working at this time. We discussed that *this seems to be aggravating the situation and this is the reason why he's not healing.*" EX 2 at 49 (italics added). At the time of his last visit with Dr. Himmel in June 2004, she continued to encourage him to undergo surgery on his left shoulder. EX 2 at 55.

Although Claimant had numerous orthopedic complaints prior to September 2002, some of which involved his left upper extremity, there is no notation in the treatment records of a rotator cuff tear involving the left shoulder. After Claimant's injury on September 25, 2002, his complaints of pain in the left shoulder increased significantly and subsequent objective testing revealed a left rotator cuff tear. Dr. Leow concluded that the rotator cuff, which was "initially acute," had become chronic, and he believed surgery was required to correct the problem since conservative treatment had failed. Similarly, Dr. Himmel specifically concluded that Claimant needed surgery for his left rotator cuff tear and determined that his continued use of the left arm and shoulder in performing work-related activities was aggravating the condition and impairing the healing process.

Dr. Kihm, like Drs. Leow and Himmel, recognized that Claimant had "a *material* aggravation of his [left shoulder] symptoms from [the September 2002] ladder-lifting incident." EX 13 at 8 (italics added). He also recommended that, if Claimant's symptoms continued, he undergo decompression surgery by Dr. Leow. *Id*. at 8-9. He wrote, however, "I do not believe there is any hurry on the basis of a tendon tear, however, and I believe that any tear of the same *will be due more to attritional changes from the impingement, than from the ladder episode.*" *Id*. at 9 (italics added). In addition, he noted that Claimant

> has an underlying problem with the left shoulder, which had an aggravation at the time of the ladder incident. If this can be rendered asymptomatic by nonoperative treatment over a reasonable period of time of three to six months, . . . then that

> may suffice. Otherwise, proceeding with the decompression would be appropriate.

*Ibid*.

Taking these statements in context, it is clear that Dr. Kihm believed Claimant suffered a "material" aggravation of his left shoulder condition on September 25, 2002, that the left rotator cuff tear was due, at least in part, to the "ladder episode," and surgery was "appropriate" if more conservative treatment did not resolve Claimant's symptoms. The only other opinion by Dr. Kihm relevant to this issue was issued a month following his initial evaluation of Claimant, on January 24, 2003, when he wrote that Claimant's September 25, 2002 injury resulted in only "a temporary aggravation that did not accelerate Mr. Jensen's pre-existing shoulder condition beyond it's [sic] natural progression." EX 14. He also wrote that Claimant's "temporary aggravation resolved uneventfully, and he is currently contending with his degenerative shoulder process." *Ibid*. There is no evidence that Dr. Kihm either saw Claimant again or reviewed additional medical records. Indeed, there is no explanation whatsoever for this more "definitive" opinion.

Given the lengthy doctor-patient relationship between Claimant and Drs. Leow and Himmel, I accord their opinions more weight than the contrary opinion of Dr. Kihm. Drs. Leow and Himmel saw Claimant on multiple occasions, both before and after his injury, and after the one time he was examined by Dr. Kihm. Both treating physicians concluded that Claimant's left shoulder rotator cuff tear was not only caused by his September 2002 injury, but that it continues to be aggravated by his work activities and requires surgery. Not only have they examined Claimant on numerous occasions, but they have also conducted and reviewed the results of various objective tests, and their treatment records are consistent with their opinions. In contrast, Dr. Kihm saw Claimant on only one occasion and made seemingly contradictory statements concerning the etiology and extent of Claimant's left shoulder condition. He found that Claimant suffered a rotator cuff tear which would require surgery if other treatment failed. He further acknowledged that the rotator cuff tear was at least partly a result of the September 2002 injury and then gave *no* explanation for his subsequent conclusion that Claimant's condition was a result of "natural progression" rather than the work injury on September 25, 2002. I find Dr. Kihm's opinions neither well reasoned nor well documented and contradicted by the other medical evidence of record.

Based on the foregoing, I find that a preponderance of the evidence shows that Claimant sustained an injury on September 25, 2002 arising out of and during the course of his employment which combined with his pre-existing shoulder condition to cause greater disability than that which would have otherwise resulted from the natural progression of his underlying condition.

Nature and Extent

Disability is defined under the LHWCA as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). As this definition makes clear, a finding of disability

requires a causal connection between a worker's physical injury and his inability to work. Consistent with this definition, the "aggravation rule" provides that "where an employment-related injury combines with, or contributes to, a pre-existing impairment or underlying condition, the entire resulting disability is compensable and the relative contributions of work-related injury and the pre-existing condition are not weighed to determine claimant's entitlement." *Johnson v. Ingalls Shipbuilding, Inc.*, 22 BRBS 160, 162 (1989) (citing *Stachan Shipbuilding Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986). *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 268 (2nd Cir. 2003) (citation omitted).

As of the date of the hearing, Claimant had not suffered any economic loss resulting from the aggravation of his shoulder injury. However, as the record makes clear, the only reason he has not done so is because he has continued to work for Employer despite his need for shoulder surgery and despite the advice of his treating physicians to discontinue activities at work which impede the healing process and accelerate his need for surgery.[5] There is no doubt that Claimant has also established that he will likely sustain a future loss of wage-earning capacity when he eventually undergoes surgery because of his shoulder condition.[6]

In 1997, the Supreme Court recognized that the Act "authorizes compensation not for physical injury as such, but for economic harm to the injured worker from decreased ability to earn wages." *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 126 (1997). The Court further noted, however, that Section 8(h) of the LHWCA confirms

> that in cases of disparity between actual wages and earning capacity, the natural effects of disability that will occur in the future must be given "due regard" as one of the "factors or circumstances in the case which may affect [a claimant's] capacity to earn wages in his disabled condition."

*Id*. at 130. Thus, in order to implement the mandate of Section 8(h), according to the Court,

> "disability" must be read broadly enough to cover loss of capacity not just as a product of the worker's injury and present market conditions, but as a potential product of injury and market opportunities in the future. There must, in other words, be a cognizable category of disability that is potentially substantial, but presently nominal in character.

*Id*. at 132. The Court thus held that a worker is entitled to an award of nominal compensation when his work-related injury had not diminished his present wage-earning capacity but where

[5] *See, e.g.*, Tr. 20-21 (Claimant testified that he did not undergo left shoulder surgery because Employer's carrier denied coverage); EX 2 at 39 (October 14, 2003 treatment note where Claimant said he was "currently not accepting the idea of any surgery as Workmen's Compensation is denying his claim and he is currently fighting it."); EX 2 at 42 (Dr. Himmel noted that Claimant should have surgery, but was "waiting because Workmen's Comp will not pay for the surgery and he's in the process of evaluating with that."); EX 2 at 49 (April 15, 2004 note in which Dr. Himmel continued to describe Claimant's left shoulder pain and wrote "he really does need to stop using his arm, but he does not want to stop working at this time.").

[6] *See, e.g.*, CX 2 at 5 (June 17, 2003 treatment note where Dr. Leow continued to recommend surgery to repair left rotator cuff "especially now that he has also failed conservative treatment.");

there was a significant potential that the injury would diminished such capacity in the future. *Id*. at 138.

Given the fact that Claimant has shown a substantial likelihood that he will suffer a loss in wage-earning capacity when he undergoes surgery to correct his left shoulder condition in the future, I find that Claimant has sustained a "disability" as that term is defined by the Act and that he is thus entitled to a nominal award of disability compensation.

Medical Expenses

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board has interpreted this provision to require that an employer pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86, 94 (1989). A claimant establishes a *prima facie* case of entitlement to reimbursement for medical expenses when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test is whether the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219. 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975) (stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). Interest may be assessed on sums owed for medical services, whether the costs were initially borne by the claimant or the providers. *Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75, 80 (1997).

As the foregoing discussion makes clear, Claimant has clearly established a *prima facie* case of entitlement to reimbursement for medical expenses associated with his left shoulder condition. The only evidence that Employer has presented to show that costs associated with medical treatment for Claimant's that condition are neither reasonable nor necessary is the opinion of Dr. Kihm. For the reasons previously given, I find that Dr. Kihm's opinion is outweighed by the contrary and better supported opinions of Drs. Leow and Himmel. Employer will thus be ordered to reimburse Claimant for all medical expenses incurred by him which are related to the September 25, 2002 left shoulder injury at issue in this case, including any costs associated with the surgery recommended by Claimant's treating physicians.

## V. INTEREST

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six percent per annum is assessed on all past due compensation payments. *Avallone*

*v. Todd Shipyards Corp*., 10 BRBS 724 (1978). The Benefits Review Board and the federal courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Santos v. General Dynamics Corp*., 22 BRBS 226 (1989); *Adams v. Newport News* Shipbuilding, 22 BRBS 78 (1989); *Smith v. Ingalls Shipbuilding*, 22 BRBS 26, 50 (1989); *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988); *Perry v. Carolina Shipping*, 20 BRBS 90 (1987); *Hoey v. General Dynamics Corp*., 17 BRBS 229 (1985); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board has stated that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimants whole, and held that "the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the district director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the district director.

**ORDER**

Based on the foregoing findings of fact, conclusions of law, and upon the entire record, IT IS HEREBY ORDERED that:

1. Employer and Carrier shall pay to Claimant disability compensation in the nominal amount of $10.00.

2. Pursuant to Section 7 of the Act, Employer and Carrier shall also pay for all of Claimant's reasonable and necessary medical benefits relating to his September 22, 2002 work-related injury.

3. The district director shall perform all calculations necessary to effect this order.

4. Any petition for the allowance of attorney fees and costs must be prepared on a line item basis and in compliance with 20 C.F.R. § 702.132 and must be filed within 20 days after the service of this Decision and Order. Should a fee petition be filed, any objection shall be on a line item basis, stating the reasons for the objection, with explanation, and shall be filed within 10 days after receipt of the fee petition. Any item not objected to as directed shall be deemed without objection, and allowed.

Within 10 days after receipt of any objection, Claimant's counsel may file a line item response.

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STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.